STATE OF MICHIGAN

COURT OF APPEALS

PERI WEINGRAD,

Plaintiff-Appellant,

v

MAGDALENE LAMPERT and REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
January 13, 2005

No. 250714
Washtenaw Circuit Court
LC No. 01-001190-CZ

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this action for damages and equitable relief, premised on federal and state constitutional and statutory civil rights provisions and protections, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8) and (10), and dismissing all of plaintiff's claims. We affirm.

I. Facts and Procedural History

In the fall of 1998, plaintiff was a graduate student at the University of Michigan working towards her Ph.D., and defendant Magdalene Lampert was plaintiff's academic advisor. Plaintiff was working on a proposal for her dissertation, which included analyzing videotapes owned and created by Lampert (data set). Evidence offered by defendants demonstrated that difficulties arose between Lampert and plaintiff regarding plaintiff's academic progress. At the same time, plaintiff was involved in an ongoing dispute with a former university School of Music employee regarding matters not entirely clear or pertinent to this case. Plaintiff alleges that she was being harassed by the former employee, which included threatening phone calls and appearances at her office space, prompting plaintiff to contact the Department of Public Safety to report this behavior. Around the same time, plaintiff's relationship with Lampert almost entirely broke down. While Lampert decided to no longer serve as plaintiff's academic advisor, plaintiff still intended to use Lampert's data set for her dissertation. The evidence indicates that the two attempted to negotiate a way for this to happen, but that an agreement was never reached.

After seeking a resolution to the issue though university channels, plaintiff brought this action, essentially alleging that Lampert wrongly withheld use of the data set in retaliation for reporting the former university employee's behavior to the police in violation of federal and state

civil rights laws. Plaintiff's complaint also alleged violations of the state and federal constitutions, as well as state tort claims. The trial court granted defendants' motion for summary disposition. In a well written and very thorough opinion, the trial court concluded that it lacked jurisdiction over all the claims other than the civil rights claims, that plaintiff failed to provide sufficient evidence on the retaliation claim to survive summary disposition, and that the § 1983 claims could only be brought against state actors in their personal capacities, finding here that the complaint only stated claims against defendants in their official capacities. The court also provided alternative grounds for dismissal. Plaintiff now appeals the trial court's ruling, which we affirm.

II. Jurisdiction of Constitutional Claims

Plaintiff contends that the trial court erred in determining that jurisdiction over counts II and III of her complaint (violation of due process under United States and Michigan Constitutions), falls exclusively with the Court of Claims. We disagree.

Determining whether the trial court properly declined jurisdiction requires the application of those statutes conferring jurisdiction, which we do de novo. *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 767; 664 NW2d 185 (2003), citing *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

"The jurisdiction of the Court of Claims is provided by statute." *Parkwood*, *supra* at 767; see also MCL 600.6419. Because the statute vests the Court of Claims with exclusive jurisdiction over some matters,[1] MCL 600.6419(1), the statute has the effect of precluding jurisdiction of the circuit court over these same matters. See generally *Rangel v Univ of Michigan*, 157 Mich App 563, 564-565; 403 NW2d 836 (1987). Pursuant to MCL 600.6401 *et seq.*, the Court of Claims has exclusive jurisdiction:

> To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies. [MCL 600.6419(1)(a).]

Accordingly, plaintiff's claims fall within the exclusive jurisdiction of the Court of Claims, and are therefore not properly before the circuit court, to the extent that the claims are against actual

[1] An exception is provided in MCL 600.6419(4), which states that the grant of exclusive jurisdiction in the act does not deprive the circuit courts of jurisdiction over actions "against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . ." Under the Civil Rights Act, MCL 37.2101 *et seq.*, jurisdiction is expressly vested with the circuit court, MCL 37.2801(1). Accordingly, the circuit courts have jurisdiction over these claims, even when brought against state agencies or officials. See *Rangel v Univ of Michigan*, 157 Mich App 563, 564-565; 403 NW2d 836 (1987).

state actors or agencies in their official capacity, and that the particular claims fall within the definition quoted above.

Turning to the second issue first, plaintiff argues, in essence, that her claim alleging violations of constitutional provisions falls outside the Court of Claims' exclusive jurisdiction. In *Silverman v Univ of Michigan Bd of Regents*, 445 Mich 209; 516 NW2d 54 (1994), overruled in part by *Parkwood*, *supra*, our Supreme Court, construing the Court of Claims Act, defined which claims fall under the jurisdiction of the Court of Claims and the circuit courts by announcing that a complaint seeking only money damages against the state must be filed in the Court of Claims, while a complaint seeking only equitable or declaratory relief must be filed in the circuit court. *Id.* at 217.[2] The Court further explained that the actual "nature of the claim," not simply how plaintiff phrases the request for relief, controls the question of jurisdiction. *Id*. at 216 n 7.

More recently our Supreme Court decided *Parkwood*, *supra*, where the plaintiff, a limited dividend housing association, received a mortgage from the Michigan State Housing Development Authority (defendant). Some years after obtaining the loan, the plaintiff indicated that it intended to pay off the mortgage, and inquired with the defendant how the balance in the escrow and reserve accounts would be allocated at payoff. *Parkwood*, *supra* at 765. The defendant indicated that it intended to retain any money left in those accounts after payoff. *Id*. at 765. The plaintiff filed suit in circuit court seeking a declaration that the money in the accounts belonged to the plaintiff. *Id*. at 765. The circuit court dismissed the matter, however, finding that the claim was in the exclusive jurisdiction of the Court of Claims. *Id*. at 766. The plaintiff appealed, and this Court reversed, determining that because the plaintiff's complaint only sought a declaratory judgment and did not seek money damages, the circuit court possessed subject matter jurisdiction. *Id*. at 766. Our Supreme Court, however, reversed.

The Supreme Court first acknowledged that *Silverman* distinguishes cases on the basis of whether the relief sought is in the form of money damages, or equitable or declaratory relief. *Id*. at 770. The Court noted, however, that in the case before it, though the plaintiff sought declaratory relief, the basis for the relief was breach of contract. *Id*. at 770. The Court indicated that based on the plain language of MCL 600.6419(1)(a), such contract-based claims fall within the jurisdiction of the Court of Claims, even if the relief sought is declaratory in nature. *Id*. at 772. Accordingly, the Court disavowed the *Silverman* line of cases to the extent that they held that the Court of Claims has exclusive jurisdiction over claims for money damages only. *Id*. at 775.

Therefore, based on *Parkwood*, the fact that plaintiff seeks both money damages and declaratory relief is not dispositive on the question of proper jurisdiction. Rather, a court must look at the particular claim being pled to determine whether it is a claim or demand "contractu" (arising in contract) and "ex delicto" (arising in tort). MCL 600.6419(1)(a).

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[2] Additionally, under MCL 600.6419a, which was added in 1984, the Court of Claims has concurrent jurisdiction with the circuit courts over any claim for equitable and declaratory relief that is ancillary to a claim filed under MCL 600.6419.

Count II of plaintiff's complaint is entitled "Due Process, US Constitution," and states that plaintiff had a property interest "in access to the data set," a property interest in the "right to pursue a doctoral program in accordance with UNIVERSITY policies," and a liberty interest "to have dignity and be free from assault and harassment." Plaintiff concludes that "the UNIVERSITY has deprived Plaintiff of protected property and liberty interests." In Count III, which is entitled, "Due Process, Michigan Constitution of 1963," plaintiff claims that she has "been treated differently as a result of her status as a female."

We find that counts II and III purport to state a claim for a "constitutional tort." Within those counts, plaintiff does not cite any other provision of state or federal law (i.e., a civil rights statute or section of the Michigan Judiciary Act), but rather pleads under the constitutional provisions standing alone. Our Supreme Court has determined that certain constitutional provisions are actionable standing alone and provide a claim for damages against the state arising from a violation by the state of the constitutional provisions. *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). This type of claim for damages, premised on a constitutional provision alone, has been commonly referred to as a "constitutional tort." See *77th Dist Judge v State*, 175 Mich App 681, 693; 438 NW2d 333 (1989), overruled on other grounds by *Parkwood*, *supra*; see also *Smith*, *supra* at 610 n 21 (Brickley, J.), 642-643 (Boyle, J. concurring in part and dissenting in part).

These claims squarely falls within the scope of the exclusive jurisdiction of the Court of Claims, as defined by MCL 600.6419(1)(a). Both in name and in function, these claims sound in tort and seek a remedy in the form of damages. Though a party may presumably seek injunctive relief to ensure compliance with constitutional provisions, studying the face of this complaint, we find that plaintiff is seeking damages for violations of constitutional provisions, an action specifically left to the Court of Claims.

Additionally, though a "constitutional tort" might appear to have properties of a civil rights-type action and certain civil rights provisions escape the jurisdiction of the Court of Claims, they escape that jurisdiction not because of their nature, but based on express provisions in the particular statute vesting the circuit court with jurisdiction. See e.g., MCL 37.2801. A tort action based on a constitutional provision standing alone does not contain the same jurisdictional instructions. The trial court did not err.

III. Application of § 1983 to Defendants

Plaintiff argues that the trial court erred in holding that defendant Regents are not "persons" under § 1983, and are therefore not subject to liability under that section. We disagree.

The question of whether certain individuals or entities fall within the definition of "person" under § 1983 presents a question of statutory interpretation, which is a question of law reviewed de novo by this Court. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

It has clearly been established that neither a state, state agency, nor a state official, in his or her official capacity, are "persons" for purposes of § 1983. *Bay Mills Indian Community v*

State, 244 Mich App 739, 749; 626 NW2d 169 (2001); *Smith*, *supra* at 544. Accordingly, the only question is whether the Regents were sued in their official or personal capacities.

Plaintiff's complaint is silent with respect to whether the suit against the Regents is against them in their personal or official capacities. It does not use the names of the individual members of the board, nor does it use any phrase like "individually" or "in their individual capacity." However, in *Moore v City of Harriman*, 272 F3d 769 (CA 6, 2001), the Sixth Circuit rejected the assertion that a plaintiff must expressly and affirmatively plead "individual capacity" in the complaint. Rather, the court adopted what it called a "course of proceedings" test to determine whether a § 1983 defendant has received notice of the plaintiff's intent to hold them personally liable. *Id.* at 772. The court indicated that the final test did not end with the complaint itself but rather extends to other pleadings, including a response to a motion for summary disposition. *Id.* "The 'course of proceedings' test considers such factors as the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability." *Moore*, *supra* at 772 n 1. Accordingly, it must be determined whether in the course of the proceedings, the Regents had notice that they were being sued individually.

Plaintiff has not suggested why the individuals would have had the requisite notice here that they were being sued in their individual capacity. As defendants indicate, plaintiff did not sue any member of the board in their individual name, nor were the individual members served. Additionally, while defendants' amended answer includes the affirmative defense of governmental immunity, it does not include the defense of qualified immunity. Accordingly, because these individuals did not have the requisite notice of the suit being against them in their individual capacities, the trial court correctly ruled that they were not subject to liability for the § 1983 claims.

IV. Title IX

Plaintiff next claims that the court erred in dismissing her claim under Title IX. We disagree.

In reviewing a motion under MCR 2.116(C)(10), this Court considers de novo all pleadings, admissions, affidavits, depositions, and other relevant documentary evidence of record to determine whether any genuine issue of material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

To have a claim based on Title IX, a plaintiff must show that the institution official with the authority to take corrective action had actual knowledge of harassment and acted deliberately indifferent in response thereto. *Gebser v Lago Vista Independent School Dist*, 524 US 274, 285; 118 S Ct 1989; 141 L Ed 2d 277 (1998). Plaintiff's theory here is that defendants acted with deliberate indifference after having knowledge of harassment at the hands of the former School of Music employee. However, at the time the incidents occurred, this person was not affiliated with defendants in any capacity. The Supreme Court has stated that the "deliberate indifference" theory of liability under Title IX applies only where the defendant organization has some control over the alleged harassment. *Davis v Monroe Co Bd of Ed*, 526 US 629, 645; 119 S Ct 1661;

143 L Ed 2d 839 (1999). Plaintiff has failed to proffer any evidence that defendants had control over the individual. Accordingly, plaintiff's claim under Title IX is not viable.

V. Retaliation

Plaintiff next argues that defendants violated the Civil Rights Act, MCL 37.2701 *et seq*. (CRA), by denying her access to the data set in retaliation for plaintiff reporting the incident with the former School of Music professor to the Department of Public Safety. We disagree. Plaintiff has quite simply not provided any evidence in opposition to defendants' motion that such decisions were made in response to protected activity. Accordingly, plaintiff's claim could not properly survive summary disposition.

VI. Interference with Educational Opportunities in Violation of Public Policy

Plaintiff's final contention is that the court erred in dismissing her claim styled as interference with education opportunities in violation of public policy. Once again, we disagree.

Plaintiff's theory is that even though defendants may generally deny her access to the research material, they may not do so for a particular reason that would violate public policy. Plaintiff's theory draws on principles behind the public policy exception to the "at-will" employment doctrine. Specifically, Michigan law recognizes a narrow exception to this doctrine whereby there are some grounds for discharging an employee that are so contrary to public policy that they are actionable. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982). Plaintiff fails to cite any authority where this "public policy" exception has been extended beyond the realm of wrongful termination, and we decline plaintiff's invitation to make such an exception.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio